No. 83-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF MISSOURI, et al.,
Petitioners,

vs.

CRATON LIDDELL, et al.,
Respondents.

BRIEF FOR RESPONDENT CITY OF ST. LOUIS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE WRIT SHOULD BE GRANTED BECAUSE THE SCOPE OF THE REMEDY ORDERED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS GROSSLY EXCEEDS THE EXTENT AND SCOPE OF THE CONSTITUTIONAL VIOLATION FOUND TO HAVE OCCURRED.

II. WHETHER THE PETITION SHOULD BE GRANTED BECAUSE THE COURT'S ORDER REQUIRING THE STATE OF MISSOURI AND CITY TAXPAYERS TO FUND CAPITAL IMPROVEMENT PROJECTS FOR THE CITY BOARD IS IMPROPER IN THAT THOSE PROJECTS WOULD UPGRADE THE SYSTEM IN WAYS ONLY REMOTELY RELATED TO DESEGREGATION, AND WILL ENTAIL UNCONSTITUTIONAL JUDICIAL TAXATION OF THE PEOPLE OF THE CITY OF ST. LOUIS.

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STATEMENT OF THE CASE

The City of St. Louis presents this brief in Support of the Petition for Certiorari filed by the State of Missouri. City of St. Louis wholly accepts the statement of the case presented by Petitioner State of Missouri.

The City of St. Louis would like to point out to this Court the fact that the City of St. Louis is not identical to the St. Louis Board of Education. These two are completely independent entities. The Board of Education is in no way financially dependent on the City of St. Louis. Judge Gibson's dissent opinion in *Liddell v. Missouri,* No. 83-1957, Order Feb. 8, 1984 at p. 76, appears to refer to the City of St. Louis as a constitutional violator. The City of St. Louis has never been found to be a

constitutional violator; in fact, City of St. Louis has been a plaintiff-intervenor in the desegregation proceedings. The reference made by Judge Gibson was to the St. Louis Board of Education, which was found to be a constitutional violator along with the State of Missouri by the Eighth Circuit in *Adams v. U.S.*, 620 F.2d 1277 (1980).

REASONS FOR GRANTING THE WRIT

The State of Missouri has presented its argument in support of certiorari in its Petition. Three foci are found in that argument: (1) the lack of findings made by the district court to support the remedy it imposed; (2) the lack of correspondence between the remedy imposed and the constitutional violation found to have occurred; and (3) the improper interference by the district court with state decision-making. Because the lower courts and the drafters of the settlement at issue here have deliberately sought judicial taxation, and because of the nature and magnitude of the remedy ordered by the district court, the City of St. Louis is compelled to state the following in support of the State of Missouri's Petition for Writ of Certiorari.

I. The Writ Should Be Granted Because The Scope Of The Remedy Ordered By The District Court And Affirmed By The Court Of Appeals Grossly Exceeds The Extent And Scope Of The Constitutional Violation Found To Have Occurred.

In 1980, the Eighth Circuit Court of Appeals reversed the district court and found the State of Missouri and the St. Louis Board of Education to have perpetuated discriminatory practices in public education. *Adams v. U.S.*, 620 F.2d 1277 (8th Cir. 1980). The Court found that although the Board had initiated various reforms following the *Brown v. Board of Education*, 347 U.S. 483 (1954) decision, those had failed to disestablish the dual school system in the City of St. Louis prescribed under Missouri law before 1954. *Adams*, at 1285-86. The Court concluded its analysis of the factual situation by

stating that it would require a "system-wide remedy for what is clearly a system-wide violation." *Adams,* at 1291.

What is vitally important in the Eighth Circuit's opinion in *Adams* is the court's discussion of the discriminatory practices of the suburban St. Louis school districts. The litigation at this stage did not involve the suburban districts as parties, yet the Court pointed out in footnote 27, that there was collaboration among the various districts and the Board of Education to perpetuate segregation in the school systems. The purpose of footnote 27 is apparent to even the most casual reader: if necessary, the Eighth Circuit would find the suburban districts constitutional co-violators to justify ordering an interdistrict remedy to alleviate the effects of past discrimination.

The Eighth Circuit invited the initiation of interdistrict proceedings by its "findings" presented in footnote 27 in *Adams.* On remand, the district court included the interdistrict approach and as a result of its orders, interdistrict litigation began. Various suburban school districts as well as St. Louis county and county officials were added as defendants. The Board was allowed to realign itself as a plaintiff.

Being fully aware of the liability found in the intradistrict phase and the remedy imposed with its attached price tag, the suburban districts agreed to settle the interdistrict litigation with the Board and other plaintiffs. The State of Missouri, City of St. Louis and United States refused to agree with the proposed settlement. When the time came for specifying the financing of the settlement provisions, the district court focused on the State of Missouri and the City Board to bear the burden. The court opined that the "primary responsibility for funding the Settlement Plan rests with those parties who have been adjudicated as liable under the Constitution for segregated conditions within the City's public schools." *Liddell v. Board of Education of City of St. Louis,* 567 F.Supp. 1037, 1051-52 (E.D.Mo. 1983). Despite footnote 27 in *Adams,* mentioned earlier, the district

court failed to identify the suburban districts as constitutional violators. Moreover, those suburban districts accomplished the *coup de grace* by avoiding all responsibility for financing the interdistrict remedy while at the same time insulating themselves from any future liability for their past discriminatory practices. What is even more astounding is the lack of any proper findings to support the interdistrict remedy.

It is axiomatic that the scope of any remedy must be tailored to the wrong committed. *General Building Contractors Ass'n v. Pennsylvania,* 458 U.S. 375 (1982). In the context of school desegregation law the remedy must fit the "nature and extent of the constitutional violation." *Milliken v. Bradley,* 418 U.S. 717, 744 (1974) (Milliken I). Once a constitutional violation has been identified, the court's remedial powers are broad and flexible. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). The corollary of the above principle must not be overlooked: in the absence of a constitutional violation a judicially imposed remedy is inappropriate. *Milliken v. Bradley,* 433 U.S. 267 (1977) (Milliken II).

The Eighth Circuit affirmed the interdistrict plan essentially by relying on *Hills v. Gautreaux,* 425 U.S. 284 (1976). In *Hills,* HUD was found to have performed certain unconstitutional discriminatory acts in the City of Chicago. The remedy imposed by that Court focused on requiring HUD to provide housing in other parts of the metropolitan Chicago area. The Court noted that the disruptive effect of the interdistrict plan would be minimal since HUD's administrative area was actually the metropolitan Chicago area rather than merely the City of Chicago. Additionally, the remedy would not interfere with any local governments since the HUD Chicago area was administered as a unitary system.

Although the decision in *Hills* can be characterized as an interdistrict remedy it clearly was not so considered by the Supreme Court. In legitimizing its decision, the Court explain-

ed that the order was proper because there was really only one administrative unit affected - the HUD metropolitan Chicago area. The Court was quick to note that the order would not "entail coercion of uninvolved governmental units, because both CHA [Chicago Housing Authority] and HUD have the authority to operate outside Chicago city limits." (footnote omitted) at 299. In distinguishing its order from the impermissible interdistrict remedy imposed in *Milliken I*, the *Hills* court pointed out that the *Milliken* court had not found the school districts to be constitutional violators. Moreover, the remedy in *Milliken* would have "abrogated the rights and powers of the suburban school districts under Michigan Law." *Hills*, at 299, n. 13.

The Eighth Circuit's reliance on *Hills* is misplaced for several reasons. First, there has never been a specific finding that the suburban St. Louis school districts committed discriminatory practices in violation of the constitution or that the State of Missouri is responsible for constitutionally violative segregation in the suburban school districts. Second, there have been no findings specifying significant segregative effects of State action in the suburban districts. Third, the school districts of the City of St. Louis and the suburban communities are independent systems wholly unlike HUD's administrative area referred to as the "Chicago housing market." Fourth, the interdistrict plan clearly interferes with local governments which have not been found to be constitutional violators, particularly the City of St. Louis which will lose revenue as a direct result of judicial taxation contemplated by the settlement at issue here.

The mandate found consistently in the progeny of *Brown v. Board of Education*, 347 U.S. 483 (1954) is patent: absent findings of constitutional violations in the suburban districts, or segregative effects of those districts in the City of St. Louis, the interdistrict remedy imposed is inappropriate. *Swann, Milliken I, Evans v. Buchanan*, 582 F.2d 750, 756 (3rd Cir. 1978), cert. denied 446 U.S. 923 (1980); *Columbus Board of Ed. v. Penick*, 443 U.S. 449 (1979).

II. The Petition Should Be Granted Because The Court's Order Requiring The State Of Missouri And City Taxpayers To Fund Capital Improvement Projects For The City Board Is Improper In That Those Projects Would Upgrade The System In Ways Only Remotely Related To Desegregation, And Will Entail Unconstitutional Judicial Taxation Of The People Of The City Of St. Louis.

The district court imposed on the State of Missouri and the taxpayers of the City of St. Louis the burden of financing massive general improvements in the St. Louis school district. The State objects to the order because it includes no guidelines for assessing the state's responsibilities in terms of any constitutional violations. There are no findings by the district court that any discriminatory practices led to inferior buildings and facilities in the school district of the City of St. Louis. Indeed, any such finding would be totally unsupported by the facts. As the district court found in 1979, the age of facilities in the City School Board's system was not related to the race of students attending them. Indeed, many newer facilities were located in predominantly black areas of the City. *Liddell v. Board of Education,* 469 F.Supp. 1304, 1339 (E.D.Mo. 1979).

The orders of the district court, affirmed by the Eighth Circuit, requiring the State of Missouri to fund various capital improvements in the St. Louis school system are improper. The findings made by the district court in *Liddell,* expressly counter any proposition that improvements were made discriminatorily. In fact, in those findings, the Court enumerated the numbers and types of facilities provided and their locations. *Liddell,* at 1338-1344. The court found that "[c]harges of intentional containment in connection with the Board's construction policy are without merit." at 1340 (footnote omitted). The court pointed out much of the new construction between 1954 and 1972 occurred in areas of the City with a predominantly black population. Unlike the findings concerning student assignment policies and faculty and administrator segregation, the findings concerning

capital improvements were never overturned by the court of appeals. See *Adams v. U.S.*, 620 F.2d 1277, 1288-1291 (8th Cir. 1980).

Despite the findings of the district court in 1979, the interdistrict settlement plan included provisions specifying major capital improvements to be made by the St. Louis Board of Education with funding by the State of Missouri. In order to be a proper remedy in a desegregation case, the capital improvements ordered *must not go "beyond* eliminating unconstitutional desegregation." *Morgan v. McKeigue*, 726 F.2d 33, 34 (1st Cir. 1984) citing *Swann*, 402 U.S. at 16. (Emphasis added.) What is obvious is that the district court and the Eighth Circuit would like to transform the St. Louis school district into a model system, attracting suburban white students, at great expense to the people of the City and to the State, so that some form of racial ratio satisfactory to the court of appeals is achieved. Although the courts pay lip service to the fact that there is no constitutional right to public education, they proceed to order the state to pay for improvements in quality of education in St. Louis. These orders directly contradict case law on the subject. In *Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983), cert. denied, No. 83-625 (April 16, 1984), the court warned against allowing a school board to use a court's remedial powers to upgrade the system "in ways only remotely related to desegregation." at 813. That court pointed out that determining an appropriate funding level may include programs that will "materially aid the success of the overall desegregation effort." at 813. See also *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982).

The First Circuit has also spoken out on the scope of a court's remedial desegregation powers. In *Morgan v. McKeigue*, 726 F.2d 33 (1st Cir. 1984), the Court vacated certain orders of the district court in Massachusetts regarding specific items in the Boston school budget. The appellate court noted that it could

not affirm the orders because the district court failed to make "findings from which [the Court] can judge the effect of this mandated expenditure upon proper desegregation goals." at 35. The Court referenced the *Swann v. Charlotte-Mecklenburg* principle that "if the remedy goes beyond eliminating unconstitutional desegregation, it is improper." *Morgan,* at 34.

Although the Eighth Circuit professes to recognize the *Nyquist* principle, *Liddell v. State of Missouri,* No. 83-1957, Order February 8, 1984, at 51-52, its interpretation is too broad. The Eighth Circuit stated that "it is sufficient to determine that the remedial program is directed to cure the general condition offending the constitution." at 51 n. 18. The problem with the appellate court's approach is that it places no effective limit on the remedies possible. Moreover, it positions the Eighth Circuit out of line with other contemporary desegregation decisions. While other courts are recognizing and enforcing the limit on desegregation powers of district courts, the Eighth Circuit has given the district court practically unbridled powers in the school system in St. Louis. Rather than requiring specific and detailed findings "indicating specifically why and in what respect the order is necessary and appropriate to achieve valid desegregation goals as yet unfulfilled", *Morgan* at 35, the Eighth Circuit requires only that the remedies ordered affect the "general condition offending the constitution."

What is obvious from the improvements ordered by the courts is that all of them are aimed at improving the general condition of the system. There have been no findings suggesting how the system affected races differently. There is no finding that programs at black schools were inferior to those in white schools. There is no evidence to suggest that physical facilities were intentionally of poorer quality for black students than for white students. Likewise, there is no finding that the programs will materially aid the desegregation effort. Indeed, the only finding concerning capital improvements is that they had no effect on alleviating unconstitutional discriminatory

practices between 1954 and 1972. Based on this pronouncement, the court's order requiring the State to fund capital improvements simply cannot stand.

In the instant case, the City Board and various suburban school districts promulgated the interdistrict plan. Of course, it was designed to benefit the interests of its drafters. However, absent some showing of educational disadvantage occasioned by disproportionate facility or program problems, the improvements in quality of education are not supported. There certainly has been no showing that the quality of education in the City of St. Louis would be better if the constitutional violations had never occurred. Absent a finding of the incremental effect of the past discrimination, a proper remedy cannot be fashioned. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977); *Milliken II* at 280.

The improvements requested by the City Board focus on improving the overall, general quality of education children receive in St. Louis. These improvements are not based on past discriminatory practices, but rather, are based on a Utopian desire to offer students in St. Louis the best education possible. As the State points out, citing the First Circuit, 'better quality education as a general goal is beyond the proper concern of the desegregation court.' Petition at 26 citing *Morgan v. Kerrigan,* 530 F.2d 401, 429 (1st Cir. 1976). Courts should not allow themselves to be tools of manipulative school systems that seek to benefit as best they can from a constitutional violation. It is not the role of the Court in a desegregation case to abet such behavior.

CONCLUSION

For the foregoing reasons, certiorari should issue to review and correct the decision below, by reversing the Court of Appeals' judgment.

Respectfully submitted

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